No. 77973-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

COREY BEITO, JR.,

PETITIONER'S REPLY

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TABLE OF CONTENTS

A. SUMMARY OF CASE 1

B. ARGUMENT 2

BECAUSE THE SIXTH AMENDMENT VIOLATION IN MR. BEITO'S CASE WAS PREJUDICIAL THE COURT SHOULD GRANT DISCRETIONARY REVIEW AND GRANT HIS PERSONAL RESTRAINT PETITION 2

1. The state has misstated the burden of proof 2

2. The constitutional error in this case resulted in substantial and actual prejudice 4

C. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

In re Sims, 118 Wn.App. 471, 73 P.3d 398 (2003) 3

In re the Personal Restraint Petition of Call, 144 Wn.2d 315, 28 P.3d 709 (2001) 4

In re the Personal Restraint Petition of Fleming, 129 Wn.2d 529, 919 P.2d 66 (1996) 3

In re the Personal Restraint Petition of Vandervlught, 120 Wn.2d 427, 842 P.2d 950 (1992) 4

State v Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) 4, 5

State v. Hagar, 154 Wn.2d, 369; 144 P.3d 298 (2006) 1, 4

A. SUMMARY OF CASE

Mr. Beito filed a Personal Restraint Petition (PRP) alleging the aggravated exceptional sentence imposed in his case violated his Fifth Amendment right to be free of double jeopardy, his Sixth Amendment right to a jury trial, and his Fourteenth Amendment due process right to proof beyond a reasonable doubt of the elements of his offense.

The Acting Chief Judge of the Court of Appeals, Division One entered an order dismissing Mr. Beito's PRP on October 19, 2005. The order concluded the Mr. Beito's PRP failed to make a showing of constitutional error becuase pursuant to State v. Hagar, 126 Wn.App. 320, 105 P.3d 65, reversed, 158 Wn.2d 369 (2006) he was not entitled to relief unless he sought to withdraw his guilty plea. The order also relied upon State v. Maestas, 124 Wn.App. 352, 101 P.3d 426 (2004), reversed 154 Wn.2d 1033 (2005) to conclude no double jeopardy violation occurred. Finally, the acting chief also failed grant Mr. Beito's motion to appoint counsel as required by RCW 10.73.150(4).

The State now concedes the order dismissing Mr. Beito's PRP was in error, specifically that pursuant to this Court's decision in State v. Hagar, 154 Wn.2d, 369; 144 P.3d 298 (2006), Mr. Beito

need not seek to withdraw his guilty plea. However, for the first time in this litigation the State now claims Mr. Beito has failed to provide a sufficient record from which to conclude he was prejudiced by the constitutional error. Response at 7-8.

The State does not challenge Mr. Beito's contention that he was entitled to the appointment of counsel nor his contention that the Acting Chief Judge lacked the authority to rule on the merits of the petition.

B. ARGUMENT

BECAUSE THE SIXTH AMENDMENT VIOLATION IN MR. BEITO'S CASE WAS PREJUDICIAL THE COURT SHOULD GRANT DISCRETIONARY REVIEW AND GRANT HIS PERSONAL RESTRAINT PETITION

The State's eleventh-hour challenge to the sufficiency of the record is not a basis for this Court to deny his motion for discretionary review and/or his Personal Restraint Petition (PRP). First, because the State has misstated the relevant standard for proving prejudice. Second, the record is more than adequate from which to find requisite prejudice.

1. The state has misstated the burden of proof. Where a PRP alleges a constitutional error the petitioner must as threshold matter show the claimed error resulted in actual prejudice. In re the

Personal Restraint Petition of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996). Where nonconstitutional error is raised the petitioner must show the error resulted in a fundamental defect "which inherently results in a complete miscarriage of justice." Id.

As the State correctly points out, the burden of establishing actual prejudice rests upon Mr. Bieto. Response at 7 (citing In re Sims, 118 Wn.App. 471, 476-77, 73 P.3d 398 (2003)). However, the State then erroneously contends Mr. Bieto can only carry this burden by proving that a hypothetical jury would not have made the same factual finding made by the trial court. Response at 7.

Sims, the very case on which the State relies, provides:

> To show prejudice, however, a defendant does not necessarily have to prove that he would have been acquitted but for the error. Rather, as courts have noted in other contexts, a defendant is prejudiced by a trial error if there is a "reasonable probability" that the error affected the trial's outcome and the error undermines the court's confidence in the trial's fairness.

Thus, Mr. Beito need not show that a hypothetical jury would not have found the aggravating fact had been proven beyond a reasonable doubt. Rather, Mr. Beito need only show there is a reasonable probability that that unconstitutional judicial fact finding affected the outcome of his case. As set forth in more detail below,

it did because at the time Mr. Bieto's crime was committed no jury, hypothetical or real, could have been charged with determining whether the State had proved the aggravating fact beyond a reasonable doubt.

2. The constitutional error in this case resulted in substantial and actual prejudice. This Court has said that unlawful confinement necessarily satisfies the higher fundamental defect standard. In re the Personal Restraint Petition of Call, 144 Wn.2d 315, 331, 28 P.3d 709 (2001). This court's decision in Hagar establishes that the sentence imposed here was unlawful. Thus having satisfied the higher standard, Mr. Beito has necessarily made the lesser showing of actual prejudice.

A review of the record more than demonstrates the actual prejudice which resulted in this case. In State v Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), this Court concluded there was no procedure within the Sentencing Reform Act (SRA) which permitted a jury to find the aggravating facts necessary to support an exceptional case. The Court's interpretation of the SRA means that is what the relevant statutes have meant since their enactment. In re the Personal Restraint Petition of Vandervlught, 120 Wn.2d 427, 436, 842 P.2d 950 (1992). Thus, under the law as existed it

the time of Mr. Beito's plea and sentence, Mr. Beito could not have received a statutorily valid exceptional sentence based upon a jury finding of the aggravating factor.

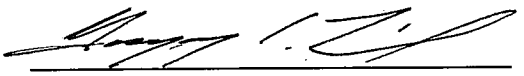
While the relevant statutes were amended to provide such authority the day following this Court's opinion in Hughes, the fact remains that at the time Mr. Beito pleaded guilty and was sentenced no such authority remains. Even if this Court determined those statutory amendments could apply retroactively to crimes committed prior to the their enactment such a decision does not alter the prejudice showing here. Such a ruling would simply allow the state to seek the empanelling of a jury on remand, but because the statutes did not exist, a jury could not have been empaneled at the time of Mr. Beito's sentencing.

Therefore, although it need not, the record here satisfies the erroneously high standard of prejudice asserted by the State in its response, i.e., the record demonstrates that but for the constitutional error Mr. Beito could not have received an exceptional sentence. At a minimum, the record establishes he could not have received a sentence that would have withstood constitutional or statutory scrutiny. Mr. Beito has met his burden of proving actual prejudice.

C. CONCLUSION

For the reasons set forth above and in his prior briefing, Mr. Beito urges this Court to grant review and grant his PRP.

Respectfully submitted this 23rd day of January 2007.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	NO. 77973-2
	)	
v.	)	
	)	
COREY BEITO, JR.,	)	
	)	
PETITIONER.	)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 23RD DAY OF JANUARY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S REPLY** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
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[X] COREY BEITO, JR.
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WASHINGTON STATE REFORMATORY
PO BOX 777
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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JANUARY, 2007.

X_____